No. 09-821

In the Supreme Court of the United States

CHARLES E. SISNEY, PETITIONER

v.

TIM REISCH, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MICHAEL S. RAAB
LOWELL V. STURGILL JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether an individual may sue a State or a state official in his official capacity for damages for violations of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. 2000cc *et seq.*

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Discussion 8
Conclusion 9

TABLE OF AUTHORITIES

Cases:

Cutter v. *Wilkinson*, 544 U.S. 709 (2005) 3
Puerto Rico Aqueduct & Sewer Auth. v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993) 7

Constitution and statutes:

U.S. Const.:
Art. I, § 8:
Cl. 1 (Spending Clause) 3, 5, 6
Cl. 3 (Commerce Clause) 3, 6
Amend. I 6
Amend. X 6
Amend. XI 5, 6, 7
Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(e) 6, 8
Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.* 1, 8
42 U.S.C. 2000cc-1 (§ 3) 2
42 U.S.C. 2000cc-1(a)(1) 2
42 U.S.C. 2000cc-1(a)(2) 2
42 U.S.C. 2000cc-1(b)(1) 3

Statutes—Continued: Page

42 U.S.C. 2000cc-1(b)(2) 3
42 U.S.C. 2000cc-2(a) 4
42 U.S.C. 2000cc-2(e) 8
42 U.S.C. 2000cc-2(f) 4
42 U.S.C. 2000cc-5(4)(A) 2
42 U.S.C. 2000cc-5(6) 4
42 U.S.C. 2000cc-5(7)(A) 2
42 U.S.C. 2000d-4a(1)(A) 4
42 U.S.C. 2000d-7 ..... 5, 6, 7
28 U.S.C. 2403(a) 6
42 U.S.C. 1983 5

Miscellaneous:

146 Cong. Rec. (2000):
p. 16,699 3
p. 16,701 3
H.R. Rep. No. 219, 106th Cong., 1st Sess. (1999) 2, 3
Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000, 146 Cong. Rec. 16,698-16,699 (2000) 2
Protecting Religious Freedom After Boerne *v.* Flores: *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. Pt. III (1998) 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 581 F.3d 639. The opinion of the district court (Pet. App. 41a-142a) is reported at 533 F. Supp. 2d 952.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2009. On December 1, 2009, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 8, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42

U.S.C. 2000cc *et seq.*, to provide statutory protection against religious discrimination, unequal treatment of religions in the provision of accommodations, and unjustified infringement of the free exercise of religion. The statute applies to two specific contexts, land use regulation and institutionalization. The provision at issue in this case is Section 3 of RLUIPA, 42 U.S.C. 2000cc-1, which provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden "is in furtherance of a compelling governmental interest," and "is the least restrictive means" of furthering that interest. 42 U.S.C. 2000cc-1(a)(1) and (2). Congress further defined the terms used in this provision. It defined "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). And Congress defined "government" as "a State, county, municipality, or other governmental entity created under the authority of a State"; "any branch, department, agency, instrumentality, or official of [such] an entity"; and "any other person acting under color of State law." 42 U.S.C. 2000cc-5(4)(A).

Before enacting RLUIPA, Congress held nine hearings over three years, during which it gathered substantial evidence that, in the absence of federal legislation, persons institutionalized in state mental hospitals, nursing homes, group homes, prisons, and detention facilities had faced substantial, unwarranted, and discriminatory burdens on their religious exercise. See, *e.g.*, H.R. Rep. No. 219, 106th Cong., 1st Sess. 5, 9 (1999) (*House Report*); *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. 16,698-16,699

(2000). Such "frivolous or arbitrary barriers" to religious exercise, *Cutter* v. *Wilkinson*, 544 U.S. 709, 716 (2005) (quoting 146 Cong. Rec. at 16,699), affected persons confined to correctional facilities in particular. See *House Report* 9-10; 146 Cong. Rec. at 16,701. Congress heard testimony about sectarian discrimination in the accommodations afforded to prisoners, see *Protecting Religious Freedom After* Boerne *v.* Flores: *Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong., 2d Sess. Pt. III, at 41 (1998) (statement of Isaac M. Jaroslawicz), as well as instances of prison officials' interfering with religious rituals without apparent justification, 146 Cong. Rec. at 16,699, 16,701.

Based on the evidence it collected, Congress concluded that prison inmates faced "frivolous or arbitrary" rules that resulted from "indifference, ignorance, bigotry, or lack of resources" and that had the effect of restricting their religious exercise "in egregious and unnecessary ways." 146 Cong. Rec. at 16,699. To prevent federal funds from contributing to such unreasoned or discriminatory burdens on the religious exercise of institutionalized persons, Congress invoked its Spending Clause authority, U.S. Const. Art. I, § 8, Cl. 1, to apply RLUIPA's statutory protections whenever a substantial burden on religious exercise "is imposed in a program or activity that receives Federal financial assistance." 42 U.S.C. 2000cc-1(b)(1).[1] A covered "program or activ-

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[1] In a provision not at issue in this case, Congress also invoked its authority under the Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, in providing that RLUIPA's protections apply to institutionalized persons when "the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States or with Indian tribes." 42 U.S.C. 2000cc-1(b)(2).

ity" includes "all of the operations of" "a department, agency, special purpose district, or other instrumentality of a State or of a local government." 42 U.S.C. 2000cc-5(6), 2000d-4a(1)(A).

To ensure that persons entitled to RLUIPA's protection may vindicate their rights, Congress created a private right of action, permitting any individual whose religious exercise has been substantially burdened in a manner prohibited by the statute to "assert a violation of this chapter as a claim or defense in a judicial proceeding" and to "obtain appropriate relief against a government." 42 U.S.C. 2000cc-2(a). In addition, the United States may seek injunctive or declaratory relief to enforce the statute. 42 U.S.C. 2000cc-2(f).

2. Petitioner has been serving a life sentence for first-degree murder at the South Dakota State Penitentiary (SDSP) since April 11, 1997. Pet. App. 43a. Petitioner, who adheres to the Jewish faith, alleges that various prison officials violated his rights under the Constitution and RLUIPA by refusing to: (1) allow him to use a succah or Sukkot Booth during the Festival of Sukkot; (2) establish a permanent Jewish place of worship; (3) grant additional service time for group Torah, Kabalistic, and language studies; (4) use the Benevolence Fund to assist a group of Jewish inmates at SDSP in their efforts to secure a visit from a Rabbi; (5) refrain from interfering with a visit by rabbinical students; (6) allow petitioner to possess certain personal property for use in the exercise of his religion; and (7) grant petitioner's request to review what he refers to as the "Jew-

ish curriculum" maintained by the Cultural Activities Coordinator. *Id.* at 46a; see *id.* at 4a-6a.[2]

Petitioner filed this action against various prison officials in their official and individual capacities, alleging violations of RLUIPA and 42 U.S.C. 1983. Pet. App. 4a. Respondents sought summary judgment, arguing, *inter alia*, that they were entitled to qualified immunity and Eleventh Amendment immunity, and that RLUIPA is unconstitutional. *Id.* at 42a-43a, 51a-58a. The district court granted summary judgment to respondents on petitioner's Section 1983 claims on the basis of qualified and Eleventh Amendment immunity. *Id.* at 51a-54a, 118a-125a. The court also granted summary judgment to respondents on petitioner's RLUIPA claims against them in their individual capacities. *Id.* at 58a-61a. The court reasoned that Congress may not use legislation enacted pursuant to the Spending Clause—such as RLUIPA—to subject an individual who is not a recipient of federal funds to private liability for money damages for actions taken in his individual capacity. *Ibid.*

The district court went on to conclude that RLUIPA authorizes damages suits against officials in their official capacities. Pet. App. 62a-75a. The court reasoned that, although RLUIPA's explicit authorization of "appropriate relief" is not sufficiently clear to put a State on notice that, by accepting federal funds for its correctional system, it agrees to waive its immunity to such claims, *id.* at 62a-70a, such clear notice is present in 42 U.S.C. 2000d-7, which provides that "[a] State shall not be immune under the Eleventh Amendment * * * from suit

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[2] Petitioner also filed: property-related claims with respect to a number of items; retaliation claims against certain of the respondents; Equal Protection claims; and a claim of denial of access to the courts. See Pet. App. 46a.

in Federal court for a violation of * * * any * * * Federal statute prohibiting discrimination by recipients of Federal financial assistance," Pet. App. 70a-71a. The district court held that, because RLUIPA is a "Federal statute prohibiting discrimination by recipients of Federal financial assistance," *id.* at 72a (quoting 42 U.S.C. 2000d-7), the State of South Dakota waived its Eleventh Amendment immunity to RLUIPA suits for money damages against state officials in their official capacities when it accepted federal funds, *id.* at 70a-72a. The court noted, however, that any monetary relief could be limited to nominal damages as required by the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e(e). Pet. App. 76a-78a. The district court also upheld the constitutionality of RLUIPA, rejecting respondents' contention that Congress exceeded its authority under the Spending Clause[3] in enacting the statute and that the statute violates the Tenth Amendment and the separation of powers doctrine. *Id.* at 102a-112a.[4]

In addition, the district court granted summary judgment in favor of respondents with respect to all of petitioners' claims except his RLUIPA and First Amendment official-capacity claims for injunctive relief concerning: (1) access to a Succah or Sukkot Booth; (2) additional time to conduct group Torah, Kabalistic, and language studies; and (3) access to a tape player in petitioner's cell. Pet. App. 82a-102a, 112a-136a.

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[3] Because the court held that RLUIPA's institutionalized persons provision is a valid exercise of Congress's Spending Clause power, the court did not address whether that provision is also a valid exercise of Congress's power under the Commerce Clause. Pet. App. 104a.

[4] The United States intervened in the district court pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of RLUIPA.

3. Petitioner filed an interlocutory appeal, which the court of appeals consolidated for purposes of appeal with another case presenting similar issues, *Van Wyhe* v. *Reisch*, No. 08-1409 (8th Cir.).[5] Pet. App. 3a. The court of appeals first upheld the district court's conclusion that Congress validly enacted RLUIPA's institutionalized persons provisions pursuant to its authority under the Spending Clause. *Id.* at 14a-23a.[6] The court of appeals disagreed with the district court, however, about whether RLUIPA validly authorizes private suits for money damages against States and state officials in their official capacities. The court held that such actions are not permitted because neither RLUIPA nor 42 U.S.C. 2000d-7 puts States on clear notice that accepting federal funds constitutes a waiver of Eleventh Amendment immunity to claims for damages. Pet. App. 23a-30a. The court of appeals further held that the district court erred in refusing to dismiss petitioner's official-capacity claims for injunctive relief regarding extra group study time, *id.* at 34a-36a, and access to a tape player, *id.* at 36a-37a, but affirmed the district court's denial of summary judgment for the claims related to petitioner's request for access to a Succah, *id.* at

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[5] The court of appeals concluded that it had appellate jurisdiction over those interlocutory appeals from orders denying a State's sovereign immunity from suit. Pet. App. 11a; see generally *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 142-147 (1993).

[6] Because the court of appeals upheld the statute as a valid exercise of Congress's Spending Clause authority, the court declined to address whether it is also a valid exercise of Congress's Commerce Clause authority. Pet. App. 23a. The court of appeals also did not address whether RLUIPA authorizes a claim for damages against state officials in their individual capacities because that issue was not presented in the appeal. *Id.* at 30a-31a n.6.

33a-34a, and with respect to his retaliation claims, *id.* at 38a-39a.

DISCUSSION

Petitioner asks this Court to decide whether an individual may sue a State or a state official in his official capacity for damages for a violation of RLUIPA, 42 U.S.C. 2000cc *et seq.* The same question is presented in *Cardinal* v. *Metrish*, No. 09-109 (filed July 22, 2009). At this Court's invitation, the United States filed a brief as amicus curiae in *Cardinal* on March 18, 2010, recommending that the Court grant the petition in *Cardinal* to decide that question. This Court should hold the petition for a writ of certiorari in this case pending its resolution of the petition in *Cardinal*, and then dispose of it accordingly.[7]

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[7] In addition, as noted in the United States' amicus brief in *Cardinal* (at 21-22), the PLRA, 42 U.S.C. 1997e(e), often poses an independent bar to recovery of money damages by state inmates under RLUIPA because the PLRA prevents an inmate from recovering more than nominal damages for a mental or emotional injury unless he can demonstrate a physical injury as well. 42 U.S.C. 1997e(e), 2000cc-2(e). Petitioner in this case does not appear to allege that he sustained a physical injury resulting from the RLUIPA violations he asserts. He therefore would not be entitled to compensatory damages in any event unless imposing a substantial burden on an individual's religious exercise in violation of RLUIPA constitutes something other than a mental or emotional injury. In *Cardinal*, by contrast, the petitioner alleges that he suffered a physical injury as a result of the alleged RLUIPA violation. For this reason, the Court may find that the petitioner in *Cardinal* is entitled to sue for compensatory damages under RLUIPA without resolving the ancillary and difficult question about whether imposing a burden on religious exercise counts as a mental or emotional injury under the PLRA.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *Cardinal* v. *Metrish*, No. 09-109 (filed July 22, 2009), and then should be disposed of accordingly.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
MICHAEL S. RAAB
LOWELL V. STURGILL JR.
Attorneys

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